82-1596

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

EUGENE TALMADGE GAULTNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE TRIAL COURT PERMITTING THE GOVERNMENT TO RE-OPEN ITS CASE-IN-CHIEF AND PRESENT ADDITIONAL EVIDENCE SUBSEQUENT TO A SPECIFICALLY ARGUED DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL VIOLATED PETITIONER'S RIGHTS AFFORDED BY RULE 29(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FIFTH AMENDMENT GUARANTEE OF FUNDAMENTAL FAIRNESS?

PARTIES TO PROCEEDINGS BELOW

The parties whose names appear in the caption of this petition are the only parties to the proceedings in the Court whose judgment is sought to be reviewed.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Eugene Talmadge Gaultney [hereinafter referred to as Petitioner] respectfully requests that a Writ of Certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

This case grows out of a ruling of the trial court which permitted Respondent to re-open its case-in-chief to introduce additional evidence following argument of Petitioner's motion for judgment of aquittal and an announcement by the trial court that the motion would be granted. The unreported opinion of the Eleventh Circuit affirming the trial court was filed on December 2, 1982. (See Appendix, p. 1a). A petition for en banc consideration was denied on January 24, 1983. (See Appendix, p. 21a).

JURISDICTION

Jurisdiction for this appeal lies under Title 28, United States Code, Section 1254 (1) in that the petition

seeks review of a case in the Court of Appeals. The decision appealed from was entered on December 2, 1982. A timely motion for rehearing en banc was denied on January 24, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case concerns Rule 29 (a) of the Federal Rules of Criminal Procedure, which provides, inter alia:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

Petitioner further relies upon the Fifth Amendment to the United States Constitution:

No person...shall be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

(i) Proceedings Below

Petitioner was indicted in a two count indictment which charged him and a co-defendant with conspiracy to distribute and substantive distribution of cocaine. Following a jury trial, Petitioner was convicted on both counts of the indictment and was sentenced to a term of imprisonment.

An appeal to the Eleventh Circuit was timely perfected, and raised, inter alia, the question of whether the trial court erred in permitting Respondent to re-open its case-in-chief for the purpose of introducing additional evidence of contraband after the

completion of argument on Petitioner's motion for judgment of acquittal and in light of an admitted agreement by counsel for Respondent and Petitioner that the additional evidence would not be introduced absent certain conditions precedent which were not satisfied.

A panel for the Eleventh Circuit affirmed Petitioner's conviction, and en banc consideration was not granted.

(ii) Statement of the Facts

The theory of prosecution in the instant matter was simple and straight forward: Petitioner was alleged to have conspired and possessed with intent to distribute one-half kilogram of cocaine. On September 23, 1981, Petitioner delivered a rolled-up, brown paper bag to his alleged co-conspirator. The parcel in fact contained cocaine, and

both Petitioner and his alleged co-conspirator were arrested by undercover and surveillance agents.

The theory of defense was equally simplistic: Petitioner, delivering the parcel as a favor to his alleged co-conspirator, did not know the contents of the bag, and therefore was innocent of any wrongdoing. The presentation of the defense, through the cross-examination of prosecution witnesses, established, inter alia that:

a. Although an informant introduced the alleged co-conspirator to undercover agent and knew the co-conspirator by name, the name of Petitioner was never discussed during the transactions;

b. The contraband was contained in a tightly rolled, opaque brown paper

bag, which itself was contained in a second opaque brown bag;

c. Agents observed that Petitioner handed the parcel to the alleged co-conspirator and no money was exchanged;

d. Upon delivery of the parcel, Petitioner drove a vehicle registered to his wife to a no parking area, and requested permission of a uniformed City of Atlanta police officer to park his car. The car was left unlocked with the motor running;

e. When he entered the airport terminal to use a public telephone, Petitioner was arrested. He gave a written statement to the agents. Petitioner did not appear nervous or frightened and the objective, factual information given by Petitioner was

verified as true and correct.

At the close of Respondent's case-in-chief, counsel for Petitioner orally argued a motion for judgment of acquittal on the basis that the proof adduced did not independently prove the existence vel non of a conspiracy. Following lengthy colloquy between counsel and the trial court, the court recessed until the following morning to further consider the matter. On the next morning, following a second session of colloquy, the court announced that Respondent had failed to prove by a preponderance of the evidence the existence of the conspiracy independent of hearsay declarations of the alleged co-conspirator. Respondent immediately moved to re-open the Government's case to introduce additional evidence.

Petitioner objected to the re-opening of the case for Respondent to introduce a small package of cocaine allegedly seized from the rear seat of Petitioner's car following his arrest. Counsel stated in his place that during pre-trial discussions, he inquired of Respodent's counsel as to whether a bill of particulars was required to ascertain the exact amount of cocaine to which Petitioner was to be tried. At the time of that conference, counsel for Respodent stated that Petiioner would be prosecuted only for the cocaine contained in the paper bag. A smaller package allegedly found on the rear seat of Petitioner's car would not be introduced into evidence unless Petitioner took the stand and denied his knowing participation in either the

conspiracy or the substantive offense.

Respondent made a tactical decision not to introduce the testimony during its case-in-chief, and in such a posture the Government should be held to the consequences of that tactical decision. The court ultimately allowed Respondent to re-open its case, and the additional contraband was introduced.

A motion for new trial asserting the prejudicial re-opening of Respondent's case-in-chief was filed.

At the hearing on the motion, counsel for Respondent conceded that...

> He [meaning defense counsel] was lead to believe that...it wouldn't be used in the case-in-chief, and the Government did not intend to use it in the case-in-chief; but I believe the court was correct in allowing the Government to re-open the case for the limited purpose of showing intent...

The Court noted...

> But that is not the issue. The issue is whether or not you led defense counsel to believe and understand that under no circumstances would you ever use that evidence in your case-in-chief, and only use it if he [meaning defendant] took the stand and denied the knowledge.

REASONS FOR GRANTING THE WRIT

Rule 29 (a) of the Federal Rules of Criminal Procedure provides that the trial court shall order the entry of a judgment of acquittal after the evidence on either side is closed if the evidence is insufficient to sustain a convicton.

This Court has never addressed the issue of whether a criminal case may be re-opened for the purpose of introduction of evidence where the prosecution has tactically agreed to

forego presentation of that evidence absent the satisfaction of a condition precedent [e.g., unless a defendant takes the stand and denies knowledge of the contents of a closed bag].

There are significant questions of federal law affecting the administration of federal courts, which have not been previously addressed by the Court, but which should be. Rule 17 of the Rules of the Supreme Court. Accordingly, a Writ of Certiorari should be granted.

This case presents a question of novel impression. None of the cases previously cited in either the briefs of the parties or the panel opinion addressed the novel factual context of the instant case. Petitioner recognizes that the decision to allow a party to re-open its case-in-chief is generally a

matter committed to the sound discretion of the trial court. United States v. Marino, 562 F.2d 941, 944 (5th Cir. 1977); United States v. Shaw, 555 F.2d 1295, 1301 (5th Cir. 1977); United States v. Doe, 488 F.2d 93, 94 (5th Cir. 1973); United States v. Batie, 457 F.2d 927, 928-29 (5th Cir. 1972); United States v. Wilcox, 450 F.2d 1131, 1143-44 (5th Cir. 1971); Maggard v. Wainwright, 432 F.2d 941, 942 (5th Cir. 1970), cert. denied, 402 U.S. (1971); Hale v. United States, 410 F.2d 147, 152 (5th Cir. 1969). It is the tactical decision of the prosecution to withhold the additional contraband which removes this case from previous decisions. Respondent, apparently confident that it would survive the motion for judgment of acquittal, withheld introduction of the

additional contraband, with the provision that it would be used only if Petitioner took the stand and denied knowledge of the contents of the box. It was only after the announcement by the trial court that it was ready to rule favorably on the motion that Respondent breached its previously stated arrangement.

Petitioner asserts prejudice from several factors, including the undue emphasis the jury would have given the additional contraband at that time; preclusion of counsel to file a pre-trial motion to suppress the contraband, and surprise. The panel concluded these factors did not constitute the "degree of prejudice" which would suggest an abuse of discretion. Petitioner additionally

argued prejudice arose from the fact that the effectiveness of his motion for judgment of acquittal was vitiated.

In a strikingly analygous case, the Tenth Circuit recently addressed the interplay of a motion for judgment of acquittal and the discretional authority of a trial court to permit the government to re-open its case.

> After the government rested its case-in-chief, defendant moved for judgment of acquittal as is permitted by Fed. R. Crim. P. 29(a). Before ruling on the motion, the court expressed concern that the government's proof of venue was deficient. The court then allowed the prosecution to re-open its case to supply the relevant evidence-given by a witness the prosecution had used in its case-in-chief---following which the court denied Hinderman's motion.

United States v. Hinderman, 625

F.2d 994, 996 (10th Cir. 1980).

The Tenth Circuit, citing the "inadvertance" of the failure to introduce the evidence concluded:

> Thus, the government's case-in-chief should not be treated as an experiment that can be cured after the defendant has, by motion, identified the failures. But the trial court must be vested with discretion to permit re-opening when mere inadvertence or some other compelling circumstance, such as that involved in this case, justifies a re-opening and no substantial prejudice will occur... Here the prosecution's failure to adequately prove venue was clearly inadvertent, and defendant suffered no prejudice or surprise. We therefore conclude that the trial court did not err.
>
> Id.

Counsel for Petitioner was under an obligation to specifically articulate the basis for the motion for judgment of

acquittal, and it is that articulation which in the instant case then provides Respondent with the ability to take a second bite at the proverbial apple.

This case presents a significant question of procedural irregularity in a criminal trial. To allow the government to proceed in such a manner takes from a criminal defendant an important element: certainty of action and accuracy in advice as to whether he should proceed to trial or not. Sanctioning the government to agree to a tactical position, allow defense counsel to rely on that position, and then permit government counsel to unilaterally alter or modify the previous arrangement puts a criminal defendant at a tactical disadvantage which should not be condoned. The decision of the trial

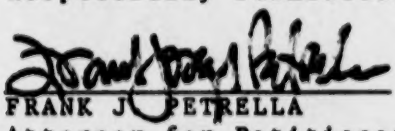
court in allowing the evidence to be reopened gave Respondent a clear advantage in this case which ultimately resulted in the conviction of Petitioner where otherwise the charges would have been dismissed.

In the prosecution of criminal cases, the government is a representative party to a legal action. That party should not gain unfair advantage at the expense of statutory and constitutionally protected rights. The decision of the trial court allowing the government to re-open its case under the instant facts violated Petitioner's right to a fundamentally fair trial and deprived him of an effective right to a motion for judgment of acquittal.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals.

Respectfully submitted,



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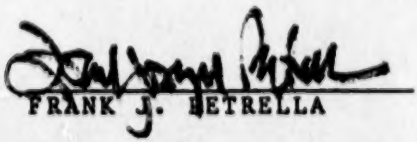
CERTIFICATE OF SERVICE

This is to certify that I have this day served the Solicitor General, Department of Justice, Washington, D.C. 20530, and Julie Carnes, Assistant United States Attorney, Room 1800, Richard Russell Federal Building, 75 Spring Street, Atlanta, Georgia 30335, copies of the within and foregoing Petition for Writ of Certiorari by depositing the same in the United States Mail with adequate postage affixed thereon to assure proper delivery.

This the 23rd day of March, 1983.



FRANK J. PETRELLA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-8145

Nonargument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EUGENE TALMADGE GAULTNEY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(December 2, 1982)

Before RONEY, VANCE and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

Defendant Eugene Talmadge Gaultney, convicted of distribution of cocaine and conspiracy to distribute cocaine under

21 U.S.C.A. Sections 841(a)(1) and 846 (West 1976), raises four claims on this appeal: (1) the district court erred in permitting the government to re-open its case-in-chief; (2) the district court erred in admitting into evidence certain statements made by Gaultney's alleged co-conspirator; (3) the evidence was insufficient to justify conviction; and (4) the district court erred in admitting testimony regarding future narcotics transactions. We reject defendant's claims and affirm.

I. RE-OPENING THE CASE-IN-CHIEF

We begin by reviewing the facts essential in evaluating Gaultney's contention that the district court abused its discretion by permitting the government to re-open its case-in-chief. On September 23, 1981, Gaultney

delivered a rolled-up brown paper bag to his alleged co-conspirator Elbert Croom at Atlanta's airport.[1] Although that bag contained cocaine, Gaultney disclaims any intention to distribute cocaine. Gaultney argues that he did not know that the bag contained cocaine until he was arrested. According to Gaultney, Croom had placed the bag in Gaultney's car on September 22, 1981. The next day, Croom called Gaultney and asked Gaultney to deliver the bag to him at the airport. Gaultney complied with Croom's request. Shortly thereafter, Drug Enforcement Agency ("DEA") agents arrested both Croom and Gaultney. The agents then searched Gaultney's car. The agents testified that they discovered, on the back seat, a white paper bag containing cocaine and a spoon

with traces of cocaine on it.

Before the trial began, Gaultney's attorney asked the prosecutor whether the defendant would have to file a bill of particulars to determine the amount of cocaine for which the defendant was charged with distributing. The prosecutor responded that the government's case-in-chief centered on the cocaine in the brown paper bag delivered to Croom. The prosecutor added that the government would not introduce into evidence the package of cocaine found in Gaultney's car unless Gaultney testified that he did not knowingly participate in distributing cocaine. After the prosecution closed its case-in-chief, defendant moved for a judgment of acquittal. The district court was prepared to grant defendant's

motion because the prosecutor had failed to prove the existence of the conspiracy, as required by United States v. James, 590 F.2d 575, 583 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979).[2] Thus, the prosecutor requested permission to re-open its case-in-chief, and the district court acceded to this request.

In general, the district court has discretion to permit the government to re-open its case-in-chief. The district court's decision is reversible only if that court abuses its discretion. E.g., United States v. Marino, 562 F.2d 941, 944 (5th Cir. 1977), cert. denied, 435 U.S. 996 (1978); United States v. Doe, 488 F.2d 93, 94 (5th Cir. 1973), cert. denied, 416 U.S. 991 (1974); United States v. Batie, 457 F.2d 927, 928-29

(5th Cir. 1972); United States v. Wilcox, 450 F.2d 1131, 1143-44 (5th Cir. 1971), cert. denied, 405 U.S. 917 (1972); Maggard v. Wainwright, 432 F.2d 941, 942 (5th Cir. 1970), cert. denied, 402 U.S. 947 (1971); Hale v. United States, 410 F.2d 147, 152 (5th Cir.), cert. denied, 396 U.S. 902 (1969). On the facts presented in this case, we are unable to say that the district court abused its discretion.

Gaultney contends that the district court may permit the government to re-open its case-in-chief only if the government seeks to present evidence inadvertently omitted, and Gaultney suggests that the omission was not inadvertent here. However, this court has never held that the district court has discretion to permit the government

to re-open its case-in-chief only when the government inadvertently omitted evidence. Indeed, on several occasions, this court has upheld re-opening without mentioning whether the prosecution's evidence had been inadvertently omitted. United States v. Doe, 488 F.2d at 94; United States v.Batie, 457 F.2d at 923-29; United States v. Wilcox, 450 F.2d at 1143-44; Maggard v. Wainwright, 432 F.2d at 942. Instead, our decisions indicate that inadvertent omission is but one of the several factors used to evaluate whether the district court properly exercised its discretion in permitting the government to re-open its case-in-chief. Other key factors include the nature of the evidence, the time during the trial that the government seeks to re-open its

case-in-chief, and the prejudice suffered by the defendant. See, e.g., United States v. Shaw, 555 F.2d 1295, 1301 (5th Cir. 1977); United States v. Batie, 457 F.2d at 928-29; Maggard v. Wainwright, 432 F.2d at 942.

Gaultney suggests that the re-opening prejudiced his defense. First, he contends that, since the government re-opened its case-in-chief after several hours of recess, the jurors placed undue emphasis on the new evidence presented. During the recess, the court heard counsel argue about the motion for a judgment of acquittal and the propriety of re-opening. The government then re-opened its case-in-chief before the defendant even began to present his case-in-chief. This court has previously upheld

district courts that permitted the government to re-open its case-in-chief even after the defendant had rested. United States v. Batie, 457 F.2d 927, 928-29 (5th Cir. 1972); United States v. Wilcox, 450 F.2d 1131, 1143 (5th Cir. 1971); see United States v. Suarez, 487 F.2d 236, 238 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974). In light of these cases and the necessity of the recess here, we uphold the district court's decision.

Gaultney claims that the re-opening prejudiced his defense in another way. Gaultney's attorney says that, if the prosecutor had not told him that the government would not use as evidence in its case-in-chief the package of cocaine and spoon found in Gaultney's car, he would have filed a motion to suppress

that cocaine as evidence. In the usual case, a motion to suppress evidence must be raised prior to trial. Fed. R. Crim. P. 12(b)(3). But in this case, the defendant could have made a strong argument that he be permitted to move to suppress during the trial under Fed. R. Crim. P. 12(f).[3] Also, it is far from clear that defendant would have prevailed on this motion to suppress. In short, we have failed to uncover that degree of prejudice which would suggest that the district court abused its discretion in permitting the government to re-open its case-in-chief.

II. ADMITTING CO-CONSPIRATOR'S STATEMENTS

Rule 801(d)(2)(E) of the Federal Rules of Evidence defines "a statement by a co-conspirator of a party during

the course and in furtherance of the conspiracy" to be a non-hearsay statement. Fed. R. Evid. 801(d)(2)(E). To protect the defendant from prejudice that may stem from such a statement, this court has established minimum standards on admitting a co-conspirator's statements as evidence and submitting them to the jury. United States v. James, 590 F.2d 575, 583 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979). Without relying on the co-conspirator's statements, the prosecution must prove three elements: (1) the conspiracy existed; (2) both the defendant and the declarant were members of the conspiracy; and (3) the statement was made during the course and in furtherance of the conspiracy. To admit the co-conspirator's statements as

evidence in the first instance, the district court must be satisfied that substantial independent evidence supports these three elements. United States v. Nicoll, 664 F.2d 1308, 1311 (5th Cir. 1982), cert. denied, ___ U.S. ___, 102 S.Ct. 2929 (19__).[4] At the close of the government's case-in-chief, the district court must conclude that the prosecution proved th three elements by a preponderance of evidence. United States v. Strauss, 678 F.2d 886, 891 n.10 (11th Cir. 1982). Provided that the distric court applied the appropriate legal standards, its James decision is reversible only if clearly erroneous. United States v. Strauss, 678 F.2d at 891 n.11; United States v. Dean, 666 F.2d 174, 179 (5th Cir. 1982), cert. denied, ___ U.S. ___, 102 S.Ct.

2300 and 2963 (19__).

Here Gaultney argues that the district court was clearly erroneous in admitting into evidence statements made by co-conspirator Croom. While waiting for Gaultney to deliver the package of cocaine, Croom made several statements to DEA agents about his source. At trial, these statements were entered into the record through testimony by DEA agents.

After reviewing the record, we hold that the district court was not clearly erroneous in its decision to admit these statements as evidence.[5] Before the government re-opened its case, substantial independent evidence showed the existence of the three James elements. Croom was negotiating a sale of cocaine with the DEA agents. Croom

telephoned somebody from the airport. Gaultney admitted that he had received telephone calls from Croom. Gaultney thereafter arrived at the airport and delivered the package to Croom. The order of proof fell within the scope of the procedures approved by James. United States v. James, 590 F.2d at 582; United States v. Miller, 664 F.2d 826, 828 (11th Cir. 1981). At the close of the trial, the three James elements were supported by a preponderance of evidence. After re-opening its case-in-chief, the government introduced what was found on the back seat of Gaultney's car -- the white paper bag containing cocaine and the spoon with traces of cocaine. William Kiser, a DEA chemist, testified that the cocaine found in Gaultney's car was remarkably

similar to the cocaine in the rolled-up brown paper bag delivered to Croom. By itself, Kiser's testimony is not as forceful as it could have been since Kiser did not conduct in-depth tests to compare the packages of cocaine.[6] All things considered, however, we conclude that sufficient evidence part from the co-conspirator's statements connected Gaultney to this conspiracy.

III. SUFFICIENCY OF THE EVIDENCE

Evidence is sufficient to sustain a criminal conviction if a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982). To evaluate the sufficiency of the evidence, the evidence is viewed in a light most favorable to the government.

Glasser v. United States, 315 U.S. 60, 80 (1942).

We hold that the evidence was sufficient. The jury is entitled to infer, from the concert of action between two men, the existence of an agreement in furtherance of a conspiracy. United States v. Dean, 666 F.2d at 174. Defendant insists that he never knew that the brown paper bag contained cocaine. Considering the evidence in the light most favorable to the government, we conclude that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

IV. ADMITTING "OTHER CRIMES" EVIDENCE

Gaultney claims that the district court erred in admitting Croom's testimony that "his source would be able

to supply to me a regular basis, two kilograms of cocaine on a regular basis." Record, vol. II, at 31. Gaultney argues that under Fed. R. Evid. 404(b) the district court erred in admitting this testimony.[7] We reject this contention. After the defendant objected to admitting this statement into evidence, the prosecutor indicated that the statement was relevant, not to prove Gaultney's character, but rather to prove intent and what occurred generally.[8] In evaluating this type of question, the district court should base its decision on Fed. R. Evid. 403 considerations -- prejudice, confusion, or waste of time. We are unable to say that the district court was incorrect in its apparent determination that the statement's

probative value was not substantially outweighed by the danger of unfair prejudice.

AFFIRMED

FOOTNOTES

[1] Gaultney was unable to locate Croom at first, and he left the airport. Although Gaultney had to attend to other business at the time, he made a second trip to the airport shortly after the first trip.

[2] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

[3] Fed. R. Crim. P. 12(b)(f) states:

> Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

[4] In Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. Id. at 34.

[5] The district court used the

correct legal standards.

[6] In an "indirect comparison," Kiser found that cocaine in one bag was 84% cocaine hydrochloride while the cocaine in the other was 85%. Record, vol. II, at 185-86. The government's case would have been more compelling if it had explained the probability that two unrelated bags of cocaine would measure at nearly identical percentages.

[7] Rule 404(b) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[8] Also, it is not clear that Croom's statement should be classified as evidence of "other crimes, wrongs or acts," since no other act has occurred.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8145

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EUGENE TALMADGE GAULTNEY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Opinion December 2, 1982, 11 Cir., 1982, ___F.2d___

(January 24, 1983)

Before JUDGES RONEY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor

Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

R. Lanier Anderson, III
United States Circuit Judge